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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RONALD LEE JONES, Defendant and Appellant.	F074518 (Super. Ct. No. 1497888) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Stanislaus County. Dawna Reeves, Judge.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Ivan P. Mars, Lewis A. Martinez and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Meehan, J. and Ellison, J.[†]

[†] Retired judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

INTRODUCTION

In January 2016, police located a car that had been reported stolen approximately one week earlier. Defendant Ronald Lee Jones was seated in the driver's seat. He was charged with driving or taking a stolen vehicle in violation of Vehicle Code section 10851, subdivision (a) (count 1) and receiving a stolen vehicle in violation of Penal Code section 496d, subdivision (a), (count 2).[1] On April 11, 2016, defendant pleaded no contest to count 2 (§ 496d, subd. (a)) and admitted he suffered a prior robbery conviction (§ 211). Count 1 (Veh. Code, § 10851, subdivision (a)) and the other prior conviction allegations were dismissed. During the same proceeding, defendant was sentenced to the upper term of three years, doubled to six years for his prior conviction within the meaning of the "Three Strikes" law, plus an additional one year for serving a prior prison term, for a total determinate term of seven years in state prison. (§§ 667, subd. (d), 667.5, subd. (b).)

Defendant filed a timely notice of appeal, which was subsequently dismissed on October 12, 2016, at defendant's request.[2] (Cal. Rules of Court, rules 8.308(a), 8.316(b)(2).) On July 5, 2016, during the pendency of his later-dismissed appeal, defendant sent the trial court a handwritten request for relief under Proposition 47 pursuant to section 1170.18. The trial court found defendant ineligible for relief and denied his petition on the ground that Proposition 47 does not apply to convictions under section 496d.

On appeal, defendant challenges the trial court's determination that he was ineligible to seek recall of his sentence and resentencing under Proposition 47. (§ 1170.18.) The People contend that defendant waived his right to appeal as part of the plea bargain, he failed to obtain a certificate of probable cause, he is not entitled to seek

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 This appeal is not at issue.

relief under Proposition 47 vis-à-vis the retrospective petitioning process set forth in section 1170.18, and if we consider his appeal on the merits, his conviction under section 496d, subdivision (a), is ineligible for relief under Proposition 47.

For the reasons set forth below, we conclude the trial court did not err in finding defendant ineligible for relief under Proposition 47 and denying his petition. Accordingly, we affirm the trial court's ruling.

DISCUSSION

I. Background

"Proposition 47 was passed by voters at the November 4, 2014, General Election, and took effect the following day. The measure's stated purpose was 'to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment,' while also ensuring 'that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.' (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70 (Voter Information Guide).) To these ends, Proposition 47 redefined several common theft- and drug-related felonies as either misdemeanors or felonies, depending on the offender's criminal history. The redefined offenses include: shoplifting of property worth $950 or less (Pen. Code, § 459.5, subd. (a)); forgery of instruments worth $950 or less (Pen. Code, § 473, subd. (b)); fraud involving financial instruments worth $950 or less (Pen. Code, § 476a, subd. (b)); theft of, or receiving, property worth $950 or less (Pen. Code, §§ 490.2, subd. (a), 496, subd. (a)); petty theft with a prior theft-related conviction (Pen. Code, § 666, subd. (a)); and possession of a controlled substance (Health & Saf. Code, §§ 11350, subd. (a), 11377, subd. (a))." (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597–598; accord, *People v. Martinez* (2018) 4 Cal.5th 647, 651.)

"Proposition 47 also added section 1170.18, concerning persons currently serving a sentence for a conviction of a crime that the proposition reduced to a misdemeanor. It permits such a person to 'petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with' specified sections that 'have been amended or added by this act.' (§ 1170.18, subd. (a).) If the trial court finds that the person meets the criteria of subdivision (a), it must recall the sentence and resentence the person to a misdemeanor, 'unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).)"[3] (*People v. Morales* (2016) 63 Cal.4th 399, 404; accord *People v. Valencia* (2017) 3 Cal.5th 347, 355.) Section 1170.18 further provides that "[a] person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f).)

II. Standard of Review

"A trial court's factual findings are reviewed for substantial evidence. [Citation.] The interpretation of a statute enacted as part of a voter initiative is a legal issue, which is

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3 Section 1170.18, subdivisions (a) and (j) were amended, effective January 1, 2017, to (1) change the terms of statutory application from "[a] person currently serving a sentence for a conviction" to "[a] person who, on November 5, 2014, was serving a sentence for a conviction," and (2) extend the petition or application filing date from "within three years after the effective date of the act that added this section or at a later date upon a showing of good cause" to "on or before November 4, 2022, or at a later date upon showing of good cause." (Legis. Counsel's Dig., Assem. Bill No. 2765, approved by Governor, Sept. 28, 2016 (2015–2016 Reg. Sess.) § 1.) Although not relevant to the issues on appeal, the statute was also amended effective June 27, 2017 (Legis. Counsel's Dig., Assem. Bill No. 103, approved by Governor, Jun. 27, 2017 (2017–2018 Reg. Sess.) §§ 2, 26), and October 7, 2017 (Legis. Counsel's Dig., Assem. Bill No. 1516, approved by Governor, Oct. 7, 2017 (2017–2018 Reg. Sess.) § 189).

reviewed de novo." (*People v. Fernandez* (2017) 11 Cal.App.5th 926, 932; accord, *People v. Bunyard* (2017) 9 Cal.App.5th 1237, 1242–1243.) The interpretation of a voter initiative relies on "the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571; accord, *People v. Valencia*, *supra*, 3 Cal.5th at p. 357.) "[V]oters who approve an initiative are presumed to '"have voted intelligently upon an amendment to their organic law, the whole text of which was supplied [to] each of them prior to the election and which they must be assumed to have duly considered...."'" (*People v. Valencia, supra,* at p. 369.) We also presume "voters, in adopting an initiative, did so being 'aware of existing laws at the time the initiative was enacted.'" (*Ibid.*; accord, *People v. Martinez, supra,* 4 Cal.5th at p. 653; *People v. Bunyard*, *supra,* at p. 1243.)

III. Trial Court Did Not Err in Denying Petition

"The ultimate burden of proving section 1170.18 eligibility lies with the petitioner." (*People v. Romanowski* (2017) 2 Cal.5th 903, 916 (*Romanowski*); accord, *People v. Page* (2017) 3 Cal.5th 1175, 1188 (*Page*).) Defendant concedes that his petition does "not fit neatly within the proposition's categories for obtaining relief," but urges us to construe the statute liberally to grant him relief.

Assuming a conviction is otherwise eligible for relief, the retrospective petitioning process set forth in section 1170.18 is, by its express terms, available to those criminal defendants who were serving a sentence on November 5, 2014, or who had completed a sentence. (§ 1170.18, subds. (a), (f); *People v. Gutierrez* (2018) 20 Cal.App.5th 847,

855.) Given that defendant was not convicted of violating section 496d until 2016, he was categorically ineligible to file a petition seeking recall of his sentence and resentencing under section 1170.18. Defendant does not contend otherwise and we may not, as he suggests, "liberally construe[]" the statute to reach a contrary result.[4] As we stated previously, "If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*People v. Superior Court (Pearson)*, *supra*, 48 Cal.4th at p. 571.)

As well, the trial court correctly determined that convictions under section 496d are not eligible for relief under Proposition 47. Defendant argues that his conviction is eligible for relief pursuant to section 490.2, subdivision (a), which was added to the Penal Code by Proposition 47.[5] This argument was considered and rejected by the Court of Appeal in *People v. Varner* (2016) 3 Cal.App.5th 360 (*Varner*), however. (*Id.* at pp. 364–365.) It was also more recently considered and rejected in *People v. Bussey* (June 27, 2018, C079797) __ Cal.App.5th __, __ [2018 Cal.App. Lexis 591, *9–*12] and

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4 Anticipating an issue with his attempt to seek relief under Proposition 47 via section 1170.18, defendant asserts that the trial court also retained jurisdiction to review his sentence under section 1170, subdivision (d)(1), which provides, in relevant part, "[T]he court may, within 120 days of the date of commitment on its own motion … recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." The trial court, however, did not act pursuant to its authority under section 1170, subdivision (d)(1), nor did defendant seek relief under this statute. (See *People v. Loper* (2015) 60 Cal.4th 1155, 1167 [recognizing a defendant's right to invite the trial court to exercise its power to resentence under § 1170, subd. (d)].)

5 Section 490.2, subdivision (a), provides: "(a) Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290."

People v. Orozco (2018) 24 Cal.App.5th 667, 674. (Contra, *People v. Williams* (2018) 23 Cal.App.5th 641, 650.)

In *Varner*, the court explained in part that the addition of section 490.2 to the Penal Code did not suggest the voters intended to include section 496d because "[s]ection 490.2 … provides a definition of petty theft that affects the definition of grand theft in section 487 and other provisions." (*Varner*, *supra*, 3 Cal.App.5th at p. 367; accord, *Page*, *supra*, 3 Cal.5th at p. 1183; *Romanowski*, *supra*, 2 Cal.5th at p. 908.) Defendant asserts that "obtaining any property by theft" includes receiving stolen property, but this argument overlooks the plain language of section 490.2 defining petty theft. (*Page*, *supra*, at p. 1183 [§ 490.2 is a petty theft provision]; *Romanowski, supra*, at p. 908 ["What section 490.2 indicates is that after the passage of Proposition 47, 'obtaining any property by theft' constitutes petty theft if the stolen property is worth less than $950."].) It also overlooks the fact that theft is specifically defined under the law. (§ 484; *Page*, *supra*, at p. 1182; see *People v. Gonzales* (2017) 2 Cal.5th 858, 864–866.)

The crime of receiving stolen property has three elements: "(1) the property was stolen; (2) the defendant knew the property was stolen …; and, (3) the defendant had possession of the stolen property." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425, disapproved on another ground in *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, fn. 14.) Although the crime requires knowledge that the property bought or received was stolen, theft under California law is an unlawful *taking*. (*Page*, *supra*, 3 Cal.5th at p. 1182; *People v. Gonzales*, *supra*, 2 Cal.5th at pp. 864–865.) While receiving stolen property might be fairly described as a theft-related crime, and we note that it is included in the larceny chapter of the Penal Code (see *Romanowski*, *supra*, 2 Cal.5th at p. 908; *People v. Sanders* (2018) 22 Cal.App. 5th 397, 404), it is not, by definition, a theft. (*Page*, *supra*, at p. 1182; *People v. Gonzales*, *supra*, at pp. 864–865.)

Defendant fails to explain how a statute expressly defining petty theft may properly be interpreted broadly enough to include nonthefts, particularly where the voters

separately amended receiving stolen property under section 496, demonstrating their consideration of the separate crime of receiving stolen property and their determination that section 496 should be included within the changes to the law made under Proposition 47.[6] (*Varner*, *supra*, 3 Cal.App.5th at p. 367.) Moreover, the California Supreme Court recently interpreted section 490.2 in determining whether Proposition 47 applies to vehicle theft under Vehicle Code section 10851 (*Page*, *supra*, 3 Cal.5th at pp. 1183–1184), and theft of access card account information under section 484e (*Romanowski*, *supra*, 2 Cal.5th at pp. 907–909). While the court has rejected reliance on a section's express inclusion, or lack of inclusion, as determinative of whether Proposition 47 applies (*People v. Martinez*, *supra*, 4 Cal.5th at p. 652; *Page*, *supra*, at pp. 1184–1185), it concluded that based on the plain language of section 490.2, vehicle theft and theft of access card account information, as crimes of theft, are included within the scope of section 490.2 (*Page*, *supra*, at p. 1183; *Romanowski*, *supra*, at p. 912).

Consistent with this reasoning, the Court of Appeal in *People v. Sanders* recently held that Proposition 47 does not apply to convictions under section 530.5, subdivision (a), for unauthorized use of personal identifying information. (*People v. Sanders*, *supra*, 22 Cal.App.5th at p. 405.) The court explained that although the crime is commonly known as "identify theft" (*id.* at p. 404), it is not a theft offense but instead "seeks to protect the victim from the misuse of his or her identity" (*id.* at p. 405).

Accordingly, we reject defendant's claim that his conviction for violating section 496d falls within the scope of Proposition 47 and conclude the trial court properly denied defendant's petition for relief under section 1170.18.[7] (*People v. Bussey*, *supra*, __

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6 Section 496 criminalizes buying or receiving stolen property. Section 496d, under which defendant was convicted, criminalizes, in relevant part, buying or receiving stolen vehicles.

7 In light of this determination, we need not address the People's arguments that defendant waived his right to appeal as part of the plea bargain and that he failed to obtain a certificate of probable cause.

Cal.App.5th at p. __ [2018 Cal.App. Lexis 591, *9–*12]; *People v. Orozco*, *supra*, 24 Cal.App.5th at p. 674; *Varner*, *supra*, 3 Cal.App.5th at p. 367.)

DISPOSITION

The trial court's order finding that defendant is ineligible for recall of sentence and resentencing under section 1170.18 is affirmed.